In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 939

JOHN OWEN TYLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 11-22) is reported at 397 F.2d 565.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 1968, and a petition for rehearing was denied on December 17, 1968. The petition for a writ of certiorari was filed on January 13, 1969. The jurisdiction of this Court in invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's conviction on three counts of an indictment charging him with willful failure to file wagering excise tax returns as required by 26 U.S.C. 4401 must be overturned as the result of this Court's decision in *Grosso* v. *United States*, 390 U.S. 62, despite the fact that petitioner did file such returns in the months both preceding and following those months in which he was charged with failing to do so.

STATEMENT

Petitioner was charged by indictment in the Northern District of Georgia with 25 counts involving violations of the federal wagering tax laws (26 U.S.C. 4401 *et seq.*). Three counts charged failure to file wagering excise tax returns in violation of 26 U.S.C. 7203; seventeen charged the filing of false returns in an attempt to evade payment of the tax in violation of 26 U.S.C. 7201; and five charged attempted evasion of the tax by failing to file returns in violation of 26 U.S.C. 7201 (R. 1-24). On April 13, 1966, he was convicted on the counts charging violation of Section 7203 and received three concurrent one-year sentences and three cumulative $1000 fines; on the counts charging violations of Section 7201, the jury was unable to reach a verdict and a mistrial was declared.

Argument on petitioner's appeal from this conviction was heard in the court of appeals on May 17, 1967, and an opinion affirming the conviction was rendered on July 10, 1968 (Pet. App. 11-22). A peti-

tion for rehearing, raising for the first time petitioner's asserted Fifth Amendment defense under this Court's decision in *Grosso* v. *United States*, 390 U.S. 62, was filed on July 24, 1968. That petition was denied in a *per curiam* opinion on December 17, 1968 (Pet. App. 24).

The evidence (see R. 92-112), insofar as it is relevant to the issue presented in this petition, showed the following chronology of petitioner's filing and failing to file monthly wagering excise tax returns (dates in italics indicate the months involved in those counts on which petitioner was convicted):

September, 1960 — return filed
October, 1960 — return filed
November, 1960 — return filed
September, 1961 — return filed
October, 1961 — *no return filed*
November, 1961 — return filed
December, 1961 — *no return filed*
January, 1962 — *no return filed*
September, 1962 — return filed
October, 1962 — return filed
November, 1962 — return filed
December, 1962 — return filed
January, 1963 — return filed
February, 1963 — return filed
April, 1963 — no return filed
May, 1963 — no return filed
June, 1963 — no return filed
July, 1963 — no return filed
August, 1963 — no return filed
September, 1963 — return filed
October, 1963 — return filed
November, 1963 — return filed
December, 1963 — return filed
January, 1964 — return filed
February, 1964 — return filed

ARGUMENT

Petitioner's contention that, under the law existing prior to this Court's decision in *Grosso* v. *United States*, 390 U.S. 62, he may not be held to have waived his privilege against self-incrimination by complying with the requirements of the wagering tax laws, is not applicable on the facts of this case. The effect of his compliance with those laws in months both preceding and following those on which his conviction was based is sufficient to remove petitioner from the class of persons entitled to the protection of the Fifth Amendment under the rationale of *Grosso*.

As this Court said in the companion case of *Marchetti* v. *United States*, 390 U.S. 39, 61:

> If, in different circumstances, a taxpayer is not confronted by substantial hazards of self-incrimination, or if he is otherwise outside the privilege's protection, nothing we decide today would shield him from the various penalties prescribed by the wagering tax statutes.

Both the *Grosso* and *Marchetti* decisions were designed to eliminate the dilemma facing the professional gambler—that is, the choice between (1) complying with the federal tax laws and risking the discovery of his activity by State and local law enforcement agencies, or (2) refusing to comply with the federal law and risking the penalties for that failure. When one horn of that dilemma is removed, the scheme of the wagering tax laws no longer presents a problem of constitutional dimension. Here petitioner's actions both before and after the period at issue have

entirely vitiated whatever argument he might have been able to make that his failure to file wagering tax returns in October and December 1961 and January 1962 was motivated by his unwillingness to risk possible incrimination.

From September 1960 to February 1964, petitioner filed seventeen wagering tax returns—four prior to October 1961 and one immediately thereafter—and twelve in various months starting with September 1962. Moreover, petitioner was registered as a professional gambler and held a wagering occupational tax stamp for the period 1960-1964 (R. 94-96). Under such circumstances, it is clear that his filing of wagering excise tax returns for the months involved could not possibly have subjected him to any "substantial hazards of self-incrimination" to which he had not already been subjected many times over.[1]

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[1] Although the court below suggested that petitioner had effectively "waived" his Fifth Amendment privilege by filing other tax returns (Pet. App. 24), there is actually no need to consider the question of waiver here. Unlike the situation in *Grosso* and *Marchetti*, no real danger of possible incrimination for petitioner obviously existed when he elected to refuse to comply with the wagering tax laws, so there was no occasion for invoking the privilege. See *e.g.*, *Rogers* v. *United States*, 340 U.S. 367, 372-373. Moreover, the court's determination in *Grosso* that the failure there to challenge the occupational tax counts on constitutional grounds did not amount to an "effective waiver" of the privilege (390 U.S. at 71) is not helpful to petitioner. The decision thus to proceed there was obviously made as a matter of trial strategy and in light of this Court's earlier decisions in *United States* v. *Kahriger*, 345 U.S. 22, and *Lewis* v. *United States*, 348 U.S. 419, which dealt only with the occupational tax and not the excise tax. It in no respect reflected a judgment that compliance with the occupa-

Accordingly, petitioner's belated attempt to rely upon the privilege to excuse his failure to file these returns must fail.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1969.

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tional tax requirements, unlike the excise tax requirements, would have involved no significant risk of incrimination. In contrast is the situation here, where petitioner complied with both requirements, except for the several months for which he failed to file returns, and it was for this failure that he was convicted.

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